SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 982

CARLO KARLOFTIS, ET AL.,

Appellants.

vs.

JAMES S. HELTON, ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF KENTUCKY

STATEMENT AS TO JURISDICTION.

S. H. BROWN,
ARTHUR B. RHORER,
W. L. HAMMOND,
CLEON K. CALVERT,
Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 982

CARLO KARLOFTIS, ET AL.,

Appellants.

vs.

JAMES S. HELTON, ET AL.

Appellees.

IN THE COURT OF APPEALS OF KENTUCKY. APPEAL FROM THE BELL CIRCUIT COURT. HONORABLE JAMES S. FORESTER, JUDGE.

BASIS OF JURISDICTION

The appellants conceive and state to the Court that the Supreme Court of the United States has jurisdiction to review and reverse the decision and judgment of the Court of Appeals of Kentucky, rendered March 14, 1944:

(1) Because each of the appellants is a legally qualified voter in Bell County, Kentucky, and as such is entitled to exercise the right of suffrage at any election held therein. (Ky. Const. sec. 145.)

(2) Because appellants and more than six hundred other legal voters in said county, on May 8, 1943, were involuntarily absent from said county in the armed service of the

United States and thereby had no right or power to exercise their right of suffrage in a local option election held in Bell County, Ky., on that date.

(3) Because their involuntary induction into the armed service of the United States, and their consequent involuntary absence from their voting places, abridged and denied them the exercise of a civil right vested in them by the Constitution of Kentucky (Ky. Const. sec. 145), and protected and guaranteed by the Constitution of the United States. (Const. U. S. Amendments 14 and 15.)

(4) Because a local option election such as was held in Bell County, Kentucky, May 8, 1943, is not an election which relates to the function and administration of government, and is not a fair election within the meaning of the Constitution of the United States or of Kentucky, where, as here, the government itself has, by induction into the armed service, deprived appellants and more than six hundred other legal voters of the right to register their sentiments in such an election. (*Hale* v. *Marshall*, 80 Ky. 552.)

April 8th, 1944.

S. H. Brown,
Arthur B. Rhorer,
W. L. Hammond,
Cleon K. Calvert,
Attorneys for Appellants.

APPENDIX.

COURT OF APPEALS OF KENTUCKY.

March 14, 1944

CARLO KARLOFTIS, et al., *Appellants.*

Appeal from the Bell Circuit Court, Judge James S. Forester.

JAMES S. HELTON, Sheriff, et al, *Appellees.*

Opinion of the Court by Commissioner Van Sant Affirming.

Appellants contest the result, as certified by the Board of Election Commissioners, of the local option election held in the First Magisterial District in Bell County on May 8, 1943. The motion to dismiss the appeal was passed to the hearing on the merits of the case. Since we have concluded that the decision of the lower Court should be affirmed, we will disregard the motion to dismiss.

The first ground for contest is that the election is violative of Section 6 of the Constitution of Kentucky, providing that all elections shall be free and equal. The basis for this contention is that more than six hundred legally qualified voters of the district, at the time of the election, were members of the armed forces of the United States of America, and stationed at various Army and Navy posts at home and abroad, and that additional legally qualified voters were engaged in work essential to the defense of the nation; and none of whom, because of their enlistment in the armed forces and their obligation to remain at their posts of duty in defense work, were present at their voting precincts on the day of the election; and, because their absence therefrom was due to circumstances beyond their control, they were not permitted to vote on the question submitted to the electorate at the election. It is additionally contended that, because of the above state of facts, the plaintiffs, McGregor and Karloftis, who were engaged in

the sale at retail of intoxicating liquors in the magisterial district involved, have been deprived of their property without due process of law, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

It is next contended the election was void, because the question submitted was not sufficiently specific for the voter to determine the scope of the question to be decided at the election. In this connection, it is pointed out that the question, "Are you in favor of adopting prohibition in Magisterial District No. 1 of Bell County, Kentucky", although complying with the statutes in respect to the question to be submitted to the voters in like and similar circumstances, does not indicate to the voter that intoxicating liquors or any other alcoholic beverages, or any other specific thing, is the business the dealing in which is to be prohibited.

The next ground for contest is that the election was not free and equal, because the persons representing the dry forces of the county caused school teachers, school children, and other persons to block the highways, roads, and streets of the district for the accomplished purpose of prohibiting persons favoring the side to which they were opposed from voting at the election.

The final contention is that the election was not free and equal, because persons representing the dry side of the question remained at a closer distance than fifty feet from the polls in every precinct in the district at all times during the progress of the election.

The demurrer to the petition setting forth the grounds above stated was sustained by the Court, and the contest dismissed. Therefore, the only question for our determination is, whether any of the alleged grounds were sufficient, if established by the evidence, to render the election void.

To uphold the first contention would be to declare that all elections for all purposes in times of war should cease, and that the civil government of the United States and the Commonwealth should no longer continue to function. Such was not the purpose of the framers of either the Constitution of the Commonwealth of Kentucky or the Constitution of the United States. No soldier of the Army or Navy, or

other branch of the armed services of the country, was prohibited from voting at the election in question. The mere fact that he was engaged in duties which prevented him from presenting himself at the polls at the time the election was held did not take from him his right of suffrage, any more than one engaged in private business who was unable to present himself at the proper time and place to cast his ballot. Section 147 of the Constitution, among other things, provides that all elections by the people shall be by secret official ballot, and marked by each voter in private at the polls, and then and there deposited. Section 6 of the Constitution providing for free and equal elections was adopted at the same time as Section 147, and each was adopted in deference to the other. Reading the two sections together, we have no diffiulty in determining that it was the purpose of the framers of the Constitution to provide that all elections shall be free and equal, but to be participated in only by eligible voters who present themselves at the polls and cast thereat a secret ballot. If the election officers, or the Act providing for an election, prohibit a voter or a certain class of voters who would otherwise be eligible to vote from casting his ballot or their ballots at the election, the Constitutional provisions relied upon would be violated. But since the Constitution provides that absentees may not vote, one may not complain that he has been prevented from casting his ballot by reason of the fact that he is unable to present himself in person at the polls on the day of the election. Appellants rely upon the decision of this Court in the case of *Wallbrecht* v. *Ingram*, 164 Ky. 463, 175 S. W. 1022, wherein it is said:

> "The very purpose of elections is to obtain a full, fair, and free expression of the popular will upon the matter, whatever it may be, submitted to the people for their approval or rejection; and when any substantial number of legal voters are, from any cause, denied the right to vote, the election is not free and equal, in the meaning of the Constitution."

We approve the principle of law expressed in the foregoing quotation; but hold that one who, from any cause,

cannot present himself at the polls, is not necessarily one who, from any cause, is denied the right to vote. No soldier in the armed forces of the country, or in work necessary to the defense of the country, is denied the right to vote, because his duties prevent him from presenting himself at the proper time and place to cast his ballot.

The second contention has been disposed of by this Court adversely to appellants' contention in the case of *Keeling* v. *Coker,* 294 Ky. 199, 171 S. W. (2d) 263, an dthe more recent case of *Neff et al.* v. *Moberly et al.,* ..... Ky. ....., 177 S. W. (2d) 7. Since the reasons for the holding are clearly set out in those opinions, it is unnecessary to discuss the question further.

Evidence that school teachers, school children, and other persons blocked the highways, roads, and streets of the district, in a reprehensible manner, and that persons representing the cause of prohibition remained at a closer distance than fifty (50) feet from the polls, equally reprehensible, is not sufficient proof, in itself, to justify the conclusion that the election was not free and equal. There is no allegation that any named person opposed to prohibition was prevented from casting his secret vote by reason of any of the acts depicted.

Since we have concluded that the election was held in accordance with the provisions of the Constitution of Kentucky, and the Statutes enacted in pursuance thereof, it follows that the election did not violate the Fifth and Fourteenth Amendments to the Constitution of the United States, forbidding the deprivation of property without due process of law. We are therefore of the opinion that the Court properly sustained the demurrer resulting in the dismissal of the petition.

The judgment is affirmed.

Attorneys for Appellants: S. H. Brown, of Frankfort, Ky. and Arthur Rhorer, of Middlesboro, Ky.

Attorneys for Appellees: H. L. Bryant, of Pineville, Ky. and W. T. Davis, of Pineville, Ky.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 982

CARLO KARLOFTIS, ET AL.,
Appellants,

vs

JAMES S. HELTON, ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

GEO. E. H. GOODNER,
H. L. BRYANT,
Counsel for Appellees.

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COURT OF APPEALS OF KENTUCKY

CARLO KARLOFTIS, ET AL.,
Appellants,

vs

JAMES S. HELTON, ET AL.,
Appellees.

BELL COUNTY.

STATEMENT AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES AND MOTION TO DISMISS THE APPEAL IN THIS CASE.

Statement.

This appeal was granted by the Chief Justice of the Court of Appeals of Kentucky on April 12, 1944, and citation was served on the attorney for appellees April 13th, and the other documents mentioned in sub-division 2 of Rule 12 have been delivered to the attorney for appellees. In compliance with sub-division 3 of the same rule the appellees make the statements against the jurisdiction of the court in this case, to wit:

1. This appeal is from the judgment of the Court of Appeals of Kentucky, which was entered March 14, 1944, when the opinion referred to in the petition for appeal was entered. The judgment and opinion affirmed the judgment of the Circuit Court of Bell County, Kentucky, which was duly made and entered in that court June 26, 1943. That judgment of the Circuit Court sustained demurrers to the

petition of these appellants contesting the local option or prohibition election.

2. That election is provided for by section 61 of the Kentucky Constitution and Chapter 242 of the Kentucky Revised Statutes. That section of the Constitution is as follows:

> "The general assembly shall, by general law, provide a means whereby the sense of the people of any county, city, town, district or precinct may be taken, as to whether or not spirituous, vinous or malt liquors shall be sold, bartered or loaned therein, or the sale thereof regulated. But nothing herein shall be construed to interfere with or to repeal any law in force relating to the sale or gift of such liquors. All elections on this question may be held on a day other than the regular election days."

3. The prohibition election was called and held in the First Magisterial District in Bell County, Kentucky, in compliance with that chapter of the Kentucky Revised Statutes. The election was duly held in the ten voting precincts in the district on the 8th day of May, 1943, as stated in the petition contesting the election. The petition lists the result of the election in each of the precincts. As there disclosed the total vote in the district for prohibition was 1091 and the vote against prohibition was 722, making a majority of 369 votes in the district in favor of prohibition. The election was not held in the whole county, as might be inferred from some of the statements in the Assignment of Errors. The vote was duly tabulated and counted and entered of record and duly certified by the Bell County Board of Election Commissioners the night of the 8th day of May, 1943. That certificate showing the result of the election was filed with the County Court Clerk and duly entered in the order book of the Bell County Court on the

7th day of June, 1943, which was the first day of the first term of the County Court following the election, as provided by KRS 242.121. Prohibition became effective and in force sixty days thereafter, or at midnight on the 6th day of August, 1943, which was sixty days after the entry of the certificate showing the result of the election in the order book of the County Court, in accordance with section 242.190 of the Kentucky Revised Statutes, which is as follows:

> "When a majority of the votes cast at an election are in favor of prohibition in the territory, prohibition shall be in force and effect at the expiration of sixty days from the date of the entry of the certificate of the county board of election commissioners in the order book of the county court."

4. The contest of the election is governed by KRS 242.120, which is as follows:

> "Any qualified voter may demand a recount of the ballots or contest the election in the same manner as is provided for the recount of ballots or contest of general elections of county officers by KRS 122.070 to 122.100. The members of the county board of election commissioners shall be named as contestees and summons shall be served upon them. Any qualified voter may intervene as contestee by filing a petition to be made a party in the action."

5. The petition contesting the election was filed by these appellants as plaintiffs therein June 7, 1943, in the Circuit Court for Bell County, Kentucky. On the 15th day of that same month one P. F. Adams, who was a citizen of the magisterial district and qualified voter therein, and who was qualified in every way to intervene in this case under the provision of KRS 242.120, above quoted, appeared in court and filed his intervening petition in this case. By proper order of the court he was permitted to intervene

herein and was made a defendant and contestee and permitted "to file such demurrers, motions and pleadings, including an answer, in proper order as this case develops." The intervening petition is in the record in this case and the order filing same, omitting the caption, is as follows:

> "Comes the intervenor contestee and defendant, P. F. Adams, and moves the court to docket this case for orders at the present term, and thereupon produced and offered to file his intervening petition to be made a party contestee and defendant herein, and the court after considering the motion and being advised sustains same, and it is now ordered that this case be, and it is hereby, docketed for orders at the present term of the court. The intervening petition is ordered to be, and is hereby, filed, and the intervenor, P. F. Adams, is allowed to intervenue as a contestee and he is made a defendant herein, and he is permitted to file such demurrers, motions and pleadings, including an answer, in proper order as this case develops.
>
> "He thereupon produced and filed a general demurrer to the petition and also seven motions combined in one group of motions which are more specifically designated in the motions, to each and all of the motions the plaintiffs object, and this cause is submitted thereon."

6. That intervenor at the same time produced and filed a general demurrer to the petition and several motions combined in one group of motions, among which was a motion to require the petition to be paragraphed. The petition was later paragraphed by proper markings on the face of same, as shown by the order of the court, which is a part of the record. The intervenor then filed another general demurrer to the petition and to each paragraph thereof separately, and the case was submitted to the court on those demurrers of the intervenor and the several motions we have mentioned.

7. The attorneys for the plaintiffs and the attorneys for the intervenor submitted briefs on the questions raised by the demurrers and motions of the intervenor. The court after considering all of same concluded that the demurrers to the petition were well taken and that it is not necessary to consider the motions, and on the 26th day of June, 1943, entered judgment sustaining the demurrers to the petition and each paragraph thereof. The plaintiffs, being the appellants here, did not offer to amend their pleading in any way, and the case was then stricken from the docket.

8. KRS 242.190, which we have already quoted, contains no provision whereby the effective date of prohibition is extended in the event of a contest of the election. The state court has been confronted with that practical question and has construed the statute so that the effective date is extended until the contest is finally decided, if it decides that the election was contested in good faith. On the other hand, if the court finds that the contest is not in good faith, or is for the purpose of delay, a provision will be included in the judgment to the effect that the litigation shall not delay the effective date.

Rogers v. *Webster*, 266 Ky. 679, 99 S. W. (2d) 781.
Goodwin v. *Anderson*, 269 Ky. 11, 106 S. W. (2d) 152.
Garrison v. *Kigins*, 273 Ky. 304, 116 S. W. (2d) 635.

9. The court found no merit in the contest petition in this case. Therefore, the judgment contains a provision that "the effective date on which prohibition and local option should become effective in the magisterial district in compliance with the result of the election and the law in such cases made and provided shall in no way be delayed

because of this action * * *." The judgment in its entirety, after omitting the caption, is as follows:

"This cause now being under submission on a general demurrer to each paragraph separately to the petition, and also on demurrer to the petition as a whole, and the plaintiffs and the intervenor and defendant, P. F. Adams, having submitted briefs on the question presented by the demurrers, and the court having considered same and being advised, and the plaintiffs taking the position that they should not be required to make their petition more specific in compliance with the motions of the intervenor so to do except the plaintiffs do indicate that they would be willing to file the exhibit No. 1, which is referred to in the petition but not filed with it, but which has not been filed, is of the opinion that neither paragraph of the petition, nor the petition as a whole, states any cause of action or ground of contesting the election, and adjudges accordingly.

"It is, therefore, adjudged by the court that the general demurrers of the intervenor and defendant, P. F. Adams, be, and they are hereby sustained to each paragraph separately and to the petition as a whole, and the petition is dismissed, and the plaintiffs, or either or any of them will take nothing on account thereof, and the intervenor will recover of the plaintiffs his cost herein, to which action and ruling of the court each and all of the plaintiffs object and except.

"The court being of the opinion that the petition utterly fails to disclose any ground of contest of the election, and that this action was probably instituted for the purpose of delaying the effective date of prohibition in Magisterial District No. 1 in Bell County, it is now ordered and adjudged that the effective date on which prohibition and local option shall become effective in the magisterial district in compliance with the result of the election and the law in such cases made and provided, shall in no way be delayed because of this action, to which each and all of the plaintiffs object and except, and each of the plaintiffs pray

an appeal from this entire judgment, which is hereby granted. This case is now stricken from the docket."

10. KRS 122.080, which is a part of the statutory procedure, as already pointed out, provides that the "contest instituted under KRS 122.070 shall proceed as equity actions." KRS 122.090 fixes the limitation for prosecuting an appeal at thirty days from the date of the judgment. In this case the limitation for an appeal expired July 26, 1943. A condition precedent to perfecting the appeal as shown by this same section of the statute is that the appellant shall execute "bond before the clerk of the Circuit Court, with good surety, conditioned for the payment of all cost and damages the other party may sustain by reason of the appeal. * * *"

11. The appeal bond is in the record and it will be observed that the only obligee specifically named is the appellee here, James S. Helton. Therefore, for that reason alone, the appeal was never perfected as to any other party to the suit as appellee.

12. A part of the procedure in perfecting appeals in civil cases in the Kentucky Court of Appeals is contained in section 739 of the Civil Code of Practice, which is as follows:

"Sec. 739. It shall be the duty of the appellant to file with the transcript—

1. A statement showing—

a. The names of the appellants, accompanied by the word 'appellants.'

b. The names of the appellees, accompanied by the word 'appellees'; or the words 'unknown appellees,' if their names be unknown.

c. The term or day when the judgment appealed from was rendered, and the page of the record on which it may be found.

d. Whether or not the appellant wishes to have a summons issued, or a warning order made; and, if any, for whom and to what county the summons shall be issued; and against whom the warning order shall be made.

2. An affidavit conforming to sections 57 and 58, if a warning order be desired."

13. The effect of failure to comply with the above section of the Code is shown by section 740, which is as follows:

"Sec. 740. No appeal shall be docketed by the Clerk until the appellant complies with the provisions of section 739, and if he fails to file the transcript within the time allowed by section 738, or by the court pursuant thereto, his appeal shall be dismissed."

14. The Statement of Appeal which was used by the appellants in their attempt to perfect the appeal in the state court is in the record and as follows:

"COURT OF APPEALS OF KENTUCKY.

CARLO KARLOFTIS, ROBERT BINGHAM, HOMER GREEN, MARTIN GREEN, JR., KELLY ASHER, EARL LEWIS, HERMON HAMMOCK, HORACE MCGREGOR, MYRTLE KARLOFTIS, BILL DENNY, CHARLES RIDINGS, SHELBY ASHER, HUBERT HENDRICKSON, JIM PATE, MRS. HELEN PAGE, CLYDE HATMAKER, BEVE P. YORK, CHARLES BROWN, *Appellants*,

vs.

HON. JAMES S. HELTON, Sheriff of Bell County and ex officio chairman of Bell County Election Commission, and Moss G. PATTERSON and T. J. INGRAM, Members of the Bell County Election Commission, and the BELL COUNTY ELECTION COMMISSION, *Appellees*.

STATEMENT OF APPEAL.

* * * * * * *

(1) The parties to this appeal are stated in the above caption.

(2) The attorneys are:

For appellants: Arthur Rhorer, Middlesboro, Kentucky, and S. H. Brown, Frankfort, Kentucky.

For appellees: H. L. Bryant, Pineville, Kentucky, and W. T. Davis, Pineville, Kentucky.

(3) This is an appeal from a judgment of the Bell Circuit Court sustaining a demurrer to appellants' petition in a wet and dry local option contest.

(4) The appeal was granted below. No summons or warning order is necessary.

ARTHUR RHORER,
Middlesboro, Ky.,
S. H. BROWN,
Frankfort, Ky.,
Attys. for appellants."

15. The appellees on this appeal to the United States Supreme Court are parties only in their official capacities as election commissioners for the county. They took no action in the case and are only nominal parties. They have done nothing to the injury of appellants. They had nothing to do with calling the election. They only performed certain ministerial duties such as naming the election officers and certifying the results. KRS 242.020; 242.040; 242.080. When the petition was dismissed, as shown by the judgment above copied, the suit was ended as to them because of the action taken therein by the intervenor and not by anything they did themselves.

Richardson v. *McChesney,* (Ky.) 218 U. S. 487, 31 S. Ct. 43, 54 L. Ed. 1121;

Mills v. *Green,* (S. C.) 159 U. S. 651, 16 S. Ct. 132, 40 L. Ed. 293.

16. These same appellants instituted an action, No. 30956, in the circuit court for Bell County, Kentucky, on the 24th

day of April, 1943, against these same and identical appellees, as defendants in that case, wherein they sought and prayed for a temporary injunction enjoining the defendants therein from appointing election officers to hold the election on May 8, 1943, which is the same election involved on this appeal, and that they be further enjoined from delivering the election ballots and supplies and from taking any action whatever toward the holding of the election. For their cause of action and as grounds for the injunction and temporary restraining order, which they therein sought to prevent the holding of the election they alleged that they were all citizens and residents of the First Magisterial District of the county and legal voters and taxpayers therein and members of the armed forces of the United States of America and that they were under the command of their superior officers and were scattered throughout the camps, forts and airports of this and other countries and in the naval training stations and on the warships of this country; that by reason thereof they could not appear and vote at the election because of those circumstances which were beyond their control, and in further detail they therein set up and alleged the same facts in this connection which they set up in their petition contesting the election in this case. They also alleged therein that certain other voters were absent for patriotic reasons and engaged in defense work, as is also alleged in their petition in this present case. They prayed further that upon final hearing the defendants therein be enjoined from holding the election or taking any action relative thereto. In the absence of both the circuit judge and the clerk of the court a temporary injunction was granted in accordance with the prayer of the petition. On proper notice a motion was made before the court by the defendants therein to discharge the restraining order. The motion was finally heard and determined by the court on the

29th day of April, 1943. The court, by an order duly made and entered on that date, discharged and set aside the temporary injunction to the end that the election be held. In the same order the plaintiffs therein were given until the 4th day of May, 1943, in which to make application before a judge of the Kentucky Court of Appeals for a revision of the order, which is the procedure in such cases, as provided by section 296 of the Kentucky Civil Code of Practice. These appellants, as plaintiffs in this case, did not make such application to a Judge of the Court of Appeals or pursue the matter any further. The order thereupon became final and the election was held. That action and the termination of same is res judicata on the question on which the adjudication of this court is sought in this case on this appeal, and is a further reason why the appeal should be dismissed. That further action and the conclusion thereof were not pleaded in this case as a defense because the present action was concluded on the demurrer of the intervenor with the result that no defense thereto was pleaded.

17. The intervenor was never made a party to the appeal because the statement of appeal does not name him as appellee. On the contrary it specifically states that the appellees, Helton, Ingram and Patterson, in their official capacities, were the opposing parties on the appeal to the Court of Appeals of Kentucky. Therefore, the judgment in favor of the intervenor became final on the 26th day of July, 1943, and all the litigation thereafter was and is moot.

Hargis v. *Congleton Co.*, 252 Ky. 192, 66 S. W. (2d) 98.
Gray v. *Greer*, 254 Ky. 809 , 70 S. W. (2d) 683.
Adams v. *Wells*, 254 Ky. 797, 72 S. W. (2d) 476.
Land v. *Salem Bank*, 279 Ky. 449, 130 S. W. (2d) 818.

18. KRS 242.030 provides that "The election shall not be held on the same day that a primary or general election is

held in the territory or any part of the territory, nor within thirty days next preceding or following a regular election." No other election was held on that day in that district, and the only thing or question involved at that election was the question of prohibition or local option.

19. In sub-paragraph 5 of paragraph I of the petition contesting the election it is alleged that "there were more than 600 qualified voters, due to circumstances beyond their control, necessarily absent from their voting precincts throughout said day, * * *; that said absent voters, both in the armed forces and in defense work are shown in lists filed herewith by precincts. Said lists of names of said voters and precincts, to which they would have been entitled to vote, had they been present, are marked for identification 'Absent Voters, exhibit #2,' and filed herewith and made a part hereof, as if copied herein in full." That list is in the record and it contains only 195 names.

20. A rule of practice in the state court is that an exhibit to a pleading will be referred to to hurt the pleading but not to help it. The allegation that 600 votes were absent cannot, therefore, be considered. That allegation can be considered only as though it had alleged the 195 which appear in the exhibit.

Liberty Life Ins. Co. v. *Strauss*, 234 Ky. 608, 28 S. W. (2d) 955. *Vandiver* v. *D. B. Wilson & Co.*, 244 Ky. 601, 51 S. W. (2d) 899.

21. Another rule of practice and pleading in the state court is that a pleading must be construed most strongly against the pleader. It then follows that, since the alleged 195 persons included voters "both in the armed forces and in defense work", that the petition must be construed that only a nominal number of voters were absent in the armed

forces, say one or two, and that the remainder were absent in defense work.

Ice Delivery Co. v. *Thomas,* 290 Ky. 230, 160 S. W. 605; *Maddox* v. *Thrift Realty Mortgage Co.,* 266 Ky. 641, 99 S. W. (2d) 793.

22. Another rule of law in the state of Kentucky is that an election will not be set aside or voided for fraud or irregularities and illegal acts if the election can be purged of those things so that the true vote and results can be known and determined free from those frauds and illegalities. Prohibition carried by 369 votes already stated. It is not alleged that all the 195 absent voters would have voted against prohibition, or that any of them for that matter would have voted that way, but if it should be considered that they all would have voted against prohibition, the proposition still would have carried by a majority of 164 votes. The court should not take jurisdiction for this reason.

Siler v. *Brown,* 215 Ky. 199, 284 S. W. 997.

23. The legal questions surrounding the election are entirely of a local nature and no federal question is involved in any view that can be taken of them.

Blitz v. *United States,* 153 U. S. 308, 14 S. Ct. 924.

24. The appeal was "improvidently sought and allowed" within the meaning of sub-division (c) of section 237 of the Judicial Code, 28 U. S. C. A. 344(c). Since the papers whereon the appeal was allowed should not be considered as a petition for a certiorari, in view of the statements herein against the jurisdiction of the court, the appeal should be dismissed with damages and cost. 36 C. J. S. 175, section 272, beginning with n. 20.

MOTION.

On the basis of the controlling facts surrounding this case, as appear in the above and foregoing statements against the jurisdiction of the court, the appellees move the court to refuse to accept jurisdiction of the case and to dismiss the appeal with appropriate damages and cost, and upon this motion they pray the judgment of the court.

GEO. E. H. GOODNER,
H. L. BRYANT,
Attorneys for Appellees.

(2000)